



STATE MINING AND GEOLOGY BOARD

EXECUTIVE OFFICER'S REPORT

Date: July 13, 2000

ITEM 8 – Adoption of Proposed Regulatory Language to Add Article 13, Selection of Professional Service Firms, to the California Code of Regulations, Title 14, Chapter 8, Subchapter 1, Commencing with Section 3920

BACKGROUND: Under the Surface Mining and Reclamation Act, (SMARA, Public Resources Code § 2710 et seq.), the State Mining and Geology Board (SMGB) is provided authority to adopt regulations to implement the Act (reference: PRC § 2755 through § 2759). Specifically, PRC § 2758 provides for the SMGB to establish regulations for the orderly evaluation of reclamation plans.

Under PRC § 2770 the SMGB may accept appeals from aggrieved surface mine operators whose reclamation plans or financial assurances have been denied by a city or county, or whose plans have not been acted upon by a city or county within a reasonable time. When the SMGB accepts such appeals, it becomes the lead agency for reviewing and approving those plans and assurances. The SMGB has adopted regulations under Articles 5 and 7 (California Code of Regulations) describing the processes for handling these appeals. In like manner, the SMGB is provided authority under SMARA (§ 2774.5) to review and approve reclamation plans for cities and counties that do not have surface mining ordinances in accordance with SMARA, or that have no surface mining ordinance at all.

The approval of a reclamation plan is considered a project under the California Environmental Quality Act (CEQA). Therefore, where CEQA has not been addressed or inadequately been addressed by the local lead agency prior to the SMGB accepting a reclamation plan appeal, the SMGB also becomes the lead agency for the preparation and acceptance of the environmental review. The preparation of an Environmental Impact Report (EIR) often must be accomplished by the SMGB with assistance from a commercial, professional consulting firm under contract to the SMGB.

In instances where the SMGB is the acting SMARA authority for a lead agency without a surface mining ordinance, the SMGB may have to contract for professional services to conduct annual mine inspections, as required by SMARA (§ 2774). At present, the SMGB is the acting lead agency for six cities and conducts annual inspections for those cities.

The Department of General Services has advised the SMGB that, in order for the SMGB to continue to let contracts for professional services in the future, it must adopt regulations in accordance with § 4526 of the Government Code (Selection of professional services firms; adoption of procedures).

On February 10, 2000 the Joint Committee recommended the proposed regulatory language for SMGB consideration. At its regularly scheduled meeting on March 9, 2000 the SMGB accepted the proposed language and ordered the adoption process to commence. The proposed regulatory language was sent out for public review and comment on May 5, 2000. The public comment period closed on June 19, 2000. One public comment was received from the Department of Trade and Commerce.

COMMENTS RECEIVED:

Department of Trade and Commerce: The Department raised the issue that the definition of “small business” contained in the proposed regulatory language may be in conflict with the “small business” definition already in statute in the Government Code (GC § 14837). The Department recommended the proposed language be changed to match that already in statute.

Response to Comment: The Executive Officer agrees with the comments raised by the Department of Trade and Commerce and the proposed definition of “small business” has been modified to reflect the definition in the Government Code. The originally proposed definition was taken from the State Water Board’s regulations. The Executive Officer has been informed by the reference attorney unit at the Office of Administrative Law that this change is “non-substantive”, in that the SMGB cannot adopt into regulation that which is in conflict with existing law, but can adopt that which is already in law, so that the amended regulatory language does not require recirculation.

PROPOSAL: It is proposed that the State Mining and Geology Board adopt the following language into regulation so as to allow the SMGB to contract for professional services from non-government sources.

ARTICLE 13

§ 3920 Selection of Professional Service Firms

(a) The purpose of these regulations is to establish those procedures authorized and required by Chapter 1434 of the Statutes of 1974, which added

Chapter 10 (commencing with Section 4525) of Division 5 of Title 1 of the Government Code.

(b) Selection by the board for professional services of private architectural, landscape architectural, engineering, environmental, land surveying, construction management, analytical laboratory, forestry, geological and geological engineering, or geophysical firms shall be on the basis of demonstrated competence and on the professional qualifications necessary for the satisfactory performance of the services required.

NOTE: Authority cited: Public Resources Code Sections 2755-2759; Section 4526, Government Code. Reference: Sections 4525-4529, Government Code.

§ 3921 Definitions, as used in these regulations:

(a) "Small business" firm is ~~one having not more than 15 personnel in the present organization, whether such personnel are professional, technical, clerical or other, defined in Government Code § 14837.~~

(b) "Architectural, landscape architectural, engineering, environmental, land surveying, construction management, analytical laboratory, forestry, geological and geological engineering, or geophysical services" are those services to be procured outside State of California Civil Service procedures and of a character necessarily rendered by an architect, landscape architect, engineer, environmental specialist, land surveyor, construction management contractor, analytical laboratory, forester, geologist and geological engineer, or geophysicist, but may include ancillary services logically or justifiably performed in connection therewith.

(c) "Project" means a project as defined in Section 10105 of the Public Contract Code, or as defined in the Public Resources Code commencing with Section 21000.

NOTE: Authority cited: Section 4526, Government Code. Reference: Sections 4525-4529, Section 14837 Government Code; Section 10105 Public Contract Code; Section 21000 Public Resources Code.

§3922 Establishment of Criteria

(a) The board shall establish criteria which will comprise the basis for selection for each project. The criteria shall include such factors as professional excellence, demonstrated competence, specialized experience of the firm, education and experience of key personnel to be assigned, staff capability, workload, ability to meet schedules, nature and quality of completed work, reliability and continuity of the firm, location, and other considerations deemed relevant. Such factors shall be weighted

by the board according to the nature of the project, the needs of the State and complexity and special requirements of the specific project.

(b) In no event shall the criteria include practices which might result in unlawful activity including, but not limited to, rebates, kickbacks, or other unlawful consideration. Board members with a relationship to a person or business entity seeking a contract under this section are prohibited from participating in the selection process if the board member would be subject to the prohibition of Section 87100.

NOTE: Authority cited: Section 4526, Government Code. Reference: Sections 4525-4529; Section 87100, Government Code.

§3923 Estimate of Value of Services

Before any discussion with any firm concerning fees, the board may cause an estimate of the value of such services to be prepared. This estimate shall serve as a guide in determining fair and reasonable compensation for the services rendered. Such estimate shall be, and remain, confidential until award of contract or abandonment of any further procedure for the services to which it relates. At any time the board determines the estimates to be unrealistic because of rising costs, special conditions, or for other relevant considerations, the estimate may be reevaluated and modified if necessary.

NOTE: Authority cited: Section 4526, Government Code. Reference: Sections 4525-4529, Government Code.

§3924 Request for Proposals

(a) Where a project requires architectural, landscape architectural, engineering, environmental, land surveying, construction management, analytical laboratory, forestry, geological and geological engineering, or geophysical services, the board shall make an announcement through a publication of the respective professional society, in a construction trade journal or in other appropriate publications, if any exist and are published within a reasonable time frame such that a lengthy publication delay does not adversely affect the project.

(b) The announcement shall contain the following information: The nature of the work, the criteria upon which the award shall be made, and the time within which statements of interest, qualification and performance data will be received.

(c) The board shall endeavor to provide to all small business firms who have indicated an interest in receiving such, a copy of each announcement for projects for which the board concludes that small business firms could be especially qualified. A

failure of the board to send a copy of an announcement to any firm shall not operate to preclude any contract.

NOTE: Authority cited: Section 4526, Government Code. Reference: Sections 4525-4529, Government Code

§3925 Selection of firm

After expiration of the period stated in the publications or other public announcements, the board shall evaluate statements of qualifications and performance data which have been submitted to the board. Discussions shall be conducted with no less than three firms regarding the required service. Where three firms cannot be found which could provide the required service, a full explanation including names and addresses of firms and individuals requested to submit proposals must be entered in the files. From the firms with which discussions are held, the board shall select no less than three, provided at least three firms submit proposals, in order of preference, based upon the established criteria, which are deemed to be the most highly qualified to provide the services required.

NOTE: Authority cited: Section 4526, Government Code. Reference: Sections 4525-4529, Government Code.

§3926 Negotiation

The board shall attempt to negotiate a contract with the most highly qualified firm. When the board is unable to negotiate a satisfactory contract with this firm with fair and reasonable compensation provisions, as determined by the procedure set forth in Section 3923 if those procedures were used, negotiations shall be terminated. The board shall then undertake negotiations with the second most qualified firm on the same basis. Failing accord, negotiations shall be terminated. The board shall then undertake negotiations with the third most qualified firm on the same basis. Failing accord, negotiations shall be terminated. Should the board be unable to negotiate a satisfactory contract at fair and reasonable compensation with any of the selected firms, additional firms may be selected in the manner prescribed and the negotiation procedure continued.

NOTE: Authority cited: Section 4526, Government Code. Reference: Sections 4525-4529, Government Code.

§3927 Amendments

In instances where the board effects a necessary change in the project during the course of performance of the contract, the firm's compensation may be adjusted by negotiation of a mutual written agreement in a fair and reasonable amount where the amount of work to be performed by the firm is changed from that which existed previously in the contemplation of the parties.

NOTE: Authority cited: Section 4526, Government Code. Reference: Sections 4525-4529, Government Code.

§3928 Contracting in Phases

Should the board determine that it is necessary or desirable to have a given project performed in phases, it will not be necessary to negotiate the total contract price or compensation provisions in the initial instance, provided that the board shall have determined that the firm is best qualified to perform the whole project at a fair and reasonable cost, and the contract contains provisions that the board, at its option, may utilize the firm for other phases and that the firm will accept a fair and reasonable price for subsequent phases to be later negotiated and reflected in a subsequent written instrument. The procedure with regard to estimates and negotiation shall otherwise be applicable.

NOTE: Authority cited: Section 4526, Government Code. Reference: Sections 4525-4529, Government Code.

§3929 Board's Power to Require Bids

Where the board determines that the services needed are technical in nature and involve little professional judgment and that requiring bids would be in the public interest, a contract shall be awarded on the basis of bids rather than by following the foregoing procedures for requesting proposals and negotiation.

NOTE: Authority cited: Section 4526, Government Code. Reference: Sections 4525-4529, Government Code.

§3930 Exclusions

The provisions of this article shall not apply to service agreements for an architect, landscape architect, engineer, environmental specialist, land surveyor, construction management contractor, analytical laboratory, forester, geologist and geological engineer, or geophysicist, engaged to provide consulting services on

specific problems on projects where the architectural, landscape architectural, engineering, environmental, land surveying, construction management, analytical laboratory, forestry, geological and geological engineering, or geophysical work is being performed by State of California Civil Service employees, nor to service agreements for the services of recognized experts retained as consultants or members of advisory boards including the State Mining and Geology Board.

NOTE: Authority cited: Section 4526, Government Code. Reference: Sections 4525-4529, Government Code.

RECOMMENDATION: The Executive Officer certifies that the regulatory adoption process has been completed in accordance with the California Administrative Procedure Act, and recommends the SMGB adopt the proposed regulatory language.